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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT of Sedgwick County, Kansas, et al, *Appellants*,

vs.

THE BOARD OF COUNTY COMMISSIONERS of Sedgwick County, Kansas, and THE CITY OF WICHITA, KANSAS, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

W. D. JOCHEMS
J. WIRTH SARGENT
Counsel for Appellants.

CHARLEY JONES, INC., WICHITA 7

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THE BOARD OF COUNTY COMMISSIONERS of Sedgwick County, Kansas, and THE CITY OF WICHITA, KANSAS, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Was the Decision of the Kansas Supreme Court A Final Judgment or Decree?

The first question raised by the appellees is whether or not a final judgment or decree (28 U. S. C. A. 1257) was rendered by the Supreme Court of Kansas.

The question of the finality of the decision of the Kansas Court is not determined or controlled by state court designation. *Cole v. Violette,* 319 U. S. 581, 87 L. ed. 1599. To be a final decree, it must end litigation by fully determining the rights of the parties so that nothing remains to be done by the lower court. *Department of Banking v. Pink,* 317 U. S. 264, 87 L. ed. 254.

A state court judgment must be subject to no further review or correction in any other state tribunal, and it must be final as an effective determination of the litigation and not merely of interlocutory or intermediate steps therein. The issues must be adjudged. A timely petition for rehearing defers finality. *Market Street R. Co. v. Railroad Com. of Cal.,* 324 U. S. 548, 89 L. ed. 1171. In determining the question of finality, the entire record will be examined. *Richfield Oil Corp. v. State Board of Eq.,* 329 U. S. 69, 91 L. ed. 80; *Gospel Army v. Los Angeles,* 331 U. S. 543, 91 L. ed. 1662; *Gulf Refining Co. v. United States,* 269 U. S. 125, 70 L. ed. 195.

Whether or not the litigation was ended by the decision of the Supreme Court of Kansas requires an analysis of the decision and a consideration of what took place in the course of the proceedings.

Although not permissible in some states (16 C. J. S., page 219, sec. 95), in Kansas the question of the constitutionality of a statute may be raised in a mandamus proceeding. On two different occasions, the question of the constitutionality of Kansas statutes was raised in mandamus actions, and the cases have been affirmed in this Court. *Wear v. Kansas ex rel. Brewster,* 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B 543, affirmed 245

U. S. 154, 62 L. ed. 214; *In re Insurance Tax Cases,* 160 Kan. 300, 161 P. 2d 726, affirmed 328 U. S. 822, 90 L. ed. 1602.

While in this case the prayer was to have a writ issued to the auditor, *the real question raised,* as shown by the opinion of the court, was the constitutionality of Chapter 391. We quote from the opinion, 166 Kan. 122:

> "In a preliminary way, it may be said that in each case the principal question raised is the constitutionality of chapter 391, . . ." (l.c. 123)

Also, at page 126, the Supreme Court of Kansas said:

> "In asking this court to rule on the questions submitted, the obvious purpose is to procure a declaration as to the soundness and validity of the several claims of unconstitutionality asserted in the answers of the defendant and of the intervenors. . . ."

For years, a method of testing the legality, regularity or constitutionality of statutes has been by so-called friendly suits. A typical case (1) is that of *State v. Akers,* 92 Kan. 169, 140 Pac. 637, affirmed 245 U. S. 154, 62 L. ed. 214, where it was said:

> "This is an original action in mandamus, the purpose of which is to test the constitutionality of chapter 259 of the Session Laws of 1913." (l.c. 171)

With the foregoing in mind, what was the decree or judgment of the Kansas Supreme Court? Admittedly, the questions in the original opinion of the Supreme

(1) Similar cases, involving the validity of bonds as against the contention that the law authorizing their issuance was unconstitutional are *City of Pittsburg v. Robb,* 143 Kan. 1, 53 P. 2d 203; *State ex rel., v. Robb,* 143 Kan. 527, 55 P. 2d 815.

Court arose upon the motion of plaintiffs to determine questions of law raised by the answers of the intervenors and defendant, and in the determination of these questions at law, the allegations of the answers, for the purpose of appellees' motion, *were necessarily admitted.* The Court had before it the answer of the intervenors and all questions of the constitutionality of Chapter 391. Having this before it, the Supreme Court of Kansas made the following statements in its opinion:

> ". . . In our opinion, it may not be said the act is unconstitutional as being arbitrary, or confiscatory of private property, or that under its terms it results in taxation of one who does not receive some benefit from the tax." (l.c. 131)
>
> ". . . we conclude that chapter 391 is not unconstitutional as depriving taxpayers of their right of due process of law under the fourteenth amendment of the federal constitution . . . nor because it provides for the payment of bonds issued thereunder by general taxation upon all taxable property within the county (or city) for any of the reasons above mentioned." (l.c. 131)
>
> "Summarizing, we hold that chapter 391 is not unconstitutional for any reason presented by the answer of the auditor of the state of Kansas or by the answer of the intervenors, as mentioned and determined above." (l.c. 137)
>
> ". . . It is apparent also that the factual situation alleged by the intervenors is not sufficient in law to justify refusal of the relief sought by the plaintiffs. . . ." (l.c. 137 and 138)

Not content with the *intermediate step* of answering the questions of law submitted by appellees' motion, the Supreme Court of Kansas, *deus ex machina,* ended the litigation by the following:

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". . . The auditor makes it clear that his refusal to register the notes tendered was not due to obstinancy . . . In this situation no peremptory writ will issue unless it be shown later the auditor still refuses to register the notes. . . ." (l.c. 137, 138)

Everything was done and decided EXCEPT THE MINISTERIAL ACT OF ISSUING THE PEREMPTORY WRIT. It was, therefore, a final judgment and decree. *Gospel Army v. Los Angeles,* supra; *Detroit and M. R. Co. v. Michigan R. Com.,* 240 U. S. 564, 60 L. ed. 802.

The practical result of the decision of the Kansas Supreme Court handed down November 13, 1948, is that it found no merit in the answers of the intervenors or of the defendant and concluded that it *was not even necessary to issue a peremptory writ* to the auditor for the reason that it would be apparent from the decision, and the auditor would recognize, that there was no longer any reason for him to refuse to register the notes.

To be sure that the decision of the Supreme Court of Kansas would not be subject to further review as having determined only an intermediate step, and to crystallize the court's attention to the *uncontroverted*(2) answer of the intervenors, and to have the Kansas

(2) In appellees' motion to dismiss, it is alleged there is a "misjoinder of diverse intervening interests" and that the issues of fact were not admitted to be true. Objections to the pleadings to be considered in the Supreme Court of the United States should have been made in the court below. *Burley v. German American Bank,* 111 U. S. 216, 28 L. ed. 406. *Partridge v. Phoenix Mutual Life Ins. Co.,* 15 Wall., 573, 21 L. ed. 229. Further, the motion for judgment filed stated "that in view of the uncontroverted Answer of Intervenors, the writs of mandamus should not issue." No objection was made by appellees to a determination of this motion upon the premise stated in the motion that the answer was *uncontroverted.* In considering the motion to determine questions of law, the answer necessarily was deemed to be true. See also (3), post.

Supreme Court decide whether or not the intervenors' answer entitled intervenors to judgment, the intervenors filed a motion for rehearing and a motion for judgment. The motion for judgment reads as follows:

> "Come now the intervenors and move the Court to enter judgment in favor of the intervenors and refuse to issue the writs of mandamus directed to the State Auditor for the reason that in view of the uncontroverted Answer of Intervenors, the writs of mandamus should not issue since Chapter 391 of the Session Laws of Kansas, 1945, as amended by Chapter 202 of the Session Laws of Kansas, 1947, now appearing as Sections 19-3301 to 19-3307, inclusive, of the 1947 Supplement to the General Statutes of Kansas, 1935, is unconstitutional and void and repugnant to the Fourteenth Amendment to the Constitution of the United States, and intervenors pray that the Court so hold." (R. 66)

Both motions were denied by the Supreme Court of Kansas on December 20, 1948 (R. 70, 71), and the result of the ruling on the motions is to reaffirm that the answer of the intervenors presented no reason for holding Chapter 391 unconstitutional and that the factual situation alleged by the intervenors was not sufficient in law to *justify the refusal of the relief sought by plaintiffs.*

The final outcome is that the answer of the defendant amounts to nothing. The ruling of the Kansas Supreme Court is equivalent to a demurrer to the answer.

That this is a final decision would appear from *Fidelity Life Ass'n. v. Hobbs,* 161 Kan. 163, 166 P. 2d 1001, syllabus 2 of which reads as follows:

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> "Where in a mandamus action the plaintiff's cause of action is admitted and no facts are alleged in the answer which would defeat the admissions the plaintiff is entitled to judgment." (3)

That the appellees considered the judgment was final would appear from the fact (alleged to be true in their motion to dismiss or affirm) that the notes have been registered with the auditor of state.

In determining whether or not the judgment appealed from is final, this Court looks through form to substance (4). While the relief sought is the writ, the real question before the Kansas Supreme Court and the real question decided adversely to appellants was the constitutionality of Chapter 391.

Any allegations made in any future proceeding similar to those allegations in intervenors' answer could be demurred to — no evidence could be introduced because the objection would be made that such evidence would not constitute a defense to an injunction action or to a mandamus action, and the consequence is that the Supreme Court of Kansas decided with finality against the contention of appellants that Chapter 391 was repugnant to the Fourteenth Amendment to the Federal Constitution.

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(3) See, also, *State ex rel., v. Reno County Comm'rs.*, 158 Kan. 573, 144 P. 2d 1012, where it was said:

> ". . . We think the motion for judgment properly raised the question whether the allegations of the answer, taken as true, stated a defense, and that it was proper for the trial court to rule on the motion." (l.c. 576)

(4) *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 77 L. Ed. 730, 87 A. L. R. 1191. See quotations from this case, Appendix A, post, pages 13 to 15.

Appellees state they made a reservation in their motions as follows:

> "This motion is without prejudice to or waiver of, and plaintiff reserves, the right to further plead after this motion is passed on and to proceed to trial should there remain issues of fact for trial." (R. 30 and 33)

The effect and purpose of this reservation in the motion is simply this — that if the Supreme Court of Kansas should have decided that Chapter 391 was unconstitutional because of one or more of the allegations in appellants' answer, then the appellees would have the opportunity of controverting the issues of fact. Such a declaration of law made upon the motion of appellees obviously would not be a final judgment and would not be appealable. If such a situation had arisen, i.e., if the Supreme Court of Kansas had declared Chapter 391 unconstitutional because of appellants' allegations in paragraph 7 (R. 40) or the allegations concerning omission of bridges, paragraph 38 (R. 55), then, before the city and county would have a final judgment to appeal from, there would have to be a determination that the allegations in paragraph 7, that the lots owned by Stearns were not subject to overflow from the Big Arkansas River, and the allegations of paragraph 38, regarding the omitted bridges, were true. When there was such a determination by a special master (a proper proceeding to determine facts in mandamus actions, *City of Iola v. Hobart,* 141 Kan. 709, 42 P. 2d 977) and judgment was rendered, it would be a final judgment, and the City and County could appeal.

But appellants are in a different position. The Kansas Supreme Court has decided that the factual situa-

tion alleged by intervenors was insufficient. As against all contentions of appellants, the case has been decided and all issues adjudged by the Kansas Supreme Court.

If appellants had not taken the appeal which they have taken, but had waited ninety days after December 20, 1948, for what appellees now contend would be a final judgment — although we do not know what they have in mind — then upon taking such appeal, after the expiration of ninety days, appellants would be met by the argument of appellees that the December 20, 1948, judgments (R. 70 and 71) were final and appellees would present a better argument for the theory of finality of the judgments than is herewith submitted. In such event, appellants would find themselves in the position of the appellant in the case of *Cole v. Violette,* supra.

We therefore respectfully submit that the judgments appealed from are final.

Is The Present Controversy Moot?

In presenting this question, appellees again stress the ministerial act of issuing a peremptory writ and overlook the real question decided — the constitutionality of Chapter 391 of the Session Laws of Kansas.

Stating in their motion that intervenors, without hearing and *ex parte,* procured leave to file an answer, they would imply that intervenors were not desired in the action, whereas the proceeding had been instituted by agreement between counsel to procure a ruling on the constitutionality of Chapter 391. (See affidavit, Appendix B, *post,* pages 16, 17) Further, any such objection should have been made in the Kansas Supreme Court

(*Alviso v. United States,* 8 Wall. 337, 19 L. ed. 305). While the Auditor of the State was the defendant and filed an answer, if intervenors had not appeared the lawsuit would have been a sham battle.

The foregoing is mentioned to show that the real parties in interest are the intervenors, and that the real question determined was the constitutionality of Chapter 391. Under such circumstances, the act of the Auditor, without notice to or knowledge of the intervenors, in carrying out the wishes of the City and County by registering the notes cannot bind or prejudice the intervenors and appellants. As also appears from the affidavit, Appendix B. *post,* pages 16, 17, the full circumstances regarding the "registration" and "sale" of the notes are not before this Court. At all events, the bank was charged with knowledge of intervenors' right to appeal.

In their contention that this controversy is moot, appellees rely upon *Codlin v. Kohlhausen,* 181 U. S. 151, 45 L. ed 793, and *Brownlow v. Schwartz,* 261 U. S. 216, 67 L. ed. 620, but in those cases there was only an action between plaintiff and defendant. There were no intervenors. While it might be said that the case is moot as between plaintiffs and defendant, Robb, the conduct of the plaintiffs and defendant could not preclude the intervenors.

As we have noted, mandamus is a proper method of determining the question of constitutionality. Intervenors are proper parties in such an action, and have the right to appeal. *Ex parte Jordan,* 4 Otto 248, 24 L. ed. 123; *International Union v. Eagle Picher M. & S. Co.,* 325 U. S. 335, 89 L. ed 1649. We have not been able to

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find a case holding that the defendant in a mandamus action can prejudice the rights of intervenors on appeal by consenting to the judgment, particularly when the intervenors are the real parties in interest.

A moot case is defined in 1 C. J. S., page 1016, as follows:

> "A moot case is one in which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights.
>
> "A moot case or question, within the meaning of the rule stated above in §17a that a court ordinarily will not decide such a case or question, is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned.
>
> "As otherwise defined, a moot case is a case which seeks to get a judgment on a pretended controversy when in reality there is none, or to get a decision in advance about a right before it has been actually asserted or contested, or a judgment on some matter which, when rendered, cannot, for any reason, have any practical legal effect upon a then existing controversy; a case in which no relief can be granted, or in which no judgment rendered can be carried into effect, or in which no decree consistent with both the pleadings and the existing facts will benefit any party as against the other parties to the litigation.
>
> "A case, however, is not moot when there is a real controversy therein to be determined, as where valuable rights are claimed by one party and denied by the other; and where there is such a controversy that the court, in the first instance, has

jurisdiction to determine certain rights, the case does not become moot, and the court's power to continue the proceeding taken away, by the fact that some of the original parties to the action have sold or conveyed their rights to others and that issues formerly raised may not have to be tried."

We therefore believe that the present case does not come under the above definition of a moot case. The intervenors were proper parties in the action and had the right to appeal. The full circumstance of what took place when the bonds were "registered" and "sold" is not before the court, and intervenors have had no opportunity to cross-examine witnesses having full knowledge of the facts. In view of the foregoing, the controversy is not moot, and a real controversy between parties adversely interested is presented.

The motion to affirm or dismiss should be denied.

Respectfully submitted,

W. D. JOCHEMS
J. WIRTH SARGENT
Counsel for Appellants.

Dated March 28, 1949.

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APPENDIX A

Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249 77 L. ed. 730.

That the opinion of the Supreme Court of Kansas in the case at issue is similar to a judgment rendered in a declaratory judgment action would appear from the following quotation from page 126 of the opinion:

> "In asking this court to rule on the questions submitted, the obvious purpose is to procure a *declaration* as to the soundness and validity of the several claims of unconstitutionality asserted in the answers of the defendant and of the intervenors. . . ." (Emphasis supplied)

Inasmuch as many of the reasons announced by this court for accepting jurisdiction in an appeal from a declaratory judgment are also present in this case, we quote from the *Nashville* case, *supra,* as follows:

> "In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. See Fidelity Nat. Bank & T. Co. v. Swope, 274 U. S. 123, 71 L. ed 959, 47 S. Ct. 511, compare Gasoline Products Co. v. Champlin Ref. Co., 283 U. S. 494, 498, 75 L. ed. 1188, 1190, 51 S. Ct. 513. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance as 'declaratory,' but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts." (l.c. 259)
>
> "That the issues thus raised and judicially determined would constitute a case or controversy if

raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. See Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378, 70 L. ed. 741, 46 S. Ct. 236, compare Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Pierce v. Society of Sisters, 68 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A. L. R. 468, Euclid v. Amber Realty Co., 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A. L. R. 1016. The proceeding terminating in the decree below, unlike that in South Spring Hill Gold Min. Co. v. Amador Medean Gold Mining Co., 145 U. S. 300, 36 L. ed. 712, 12 S. Ct. 921; Muskrat v. United States, 219 U. S. 346, 55 L. ed. 246, 31 S. Ct. 250, was between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill and admitted by the demurrer. Unlike Fairchild v. Hughes, 258 U. S. 126, 66 L. ed. 499, 42 S. Ct. 274; Texas v. Interstate Commerce Commission, 258 U. S. 158, 66 L. ed. 531, 42 S. Ct. 261; Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 S. Ct. 597; New Jersey v. Sargent, 269 U. S. 328, 70 L. ed. 289, 46 S. Ct. 122, valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the decision of the question of law; and unlike Luther v. Borden, 7 How. 1, 12 L. ed. 581; Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224; Keller v. Potomac Electric Power Co., 261 U. S. 428, 67 L. ed. 731, 43 S. Ct. 445; Federal Radio Commission v. General Electric Co., 281 U. S. 464, 74 L. ed. 969, 50 S. Ct. 389, the question lends itself to judicial determination and is of the kind which this Court traditionally decides. The relief sought is a definite adjudication of the disputed constitutional right of the appellant, in the circumstances

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alleged, to be free from the tax, see Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 724, 73 L. ed. 918, 925, 49 S. Ct. 499 . . ." (l.c. 261 and 262)

"The issues raised are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below. . . ." (l.c. 264)

APPENDIX B

Affidavit

State of Kansas, County of Sedgwick, ss:

J. Wirth Sargent, of lawful age, being first duly sworn upon his oath, states that in May and June of 1948, he had several conferences with W. F. Lilleston and Wayne Coulson; that in these conferences, affiant was representing parties against the Army Plan of flood control, Wayne Coulson was representing the City of Wichita, and W. F. Lilleston was representing the Board of County Commissioners of Sedgwick County, Kansas; that W. F. Lilleston proposed in substance that the City and County file a mandamus action against the State Auditor asking for a writ of mandamus to require the State Auditor to issue certain notes. W. F. Lilleston also proposed, in substance, that this affiant, acting for and on behalf of his clients, intervene in said action so that there could be a determination by the Supreme Court of Kansas of the constitutionality of Chapter 391 without the necessity of having a trial in the District Court of Kansas, and an appeal later to the Supreme Court; that he proposed that the intervenors set up all objections which they had to the constitutionality of Chapter 391 so that such questions could be determined by the Supreme Court of Kansas. Affiant states that he agreed to that procedure, filed an application for leave to intervene, and later filed an answer on behalf of the intervenors.

Affiant further states that prior to November 23, 1948, he personally told Wayne Coulson and W. F. Lilleston that he intended to file a motion for rehearing and a

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motion for judgment and that if the motions were overruled that he had been authorized by his clients to appeal to the Supreme Court of the United States; and affiant states that he advised Wayne Coulson and W. F. Lilleston that if the motions were denied he would file an appeal on behalf of his clients, the intervenors.

Affiant further states that two or three days prior to March 11, 1949, he consulted with Wayne Coulson and W. F. Lilleston regarding the transcript of the record in the Supreme Court in an attempt to come to an agreement upon the contents of the transcript; that upon returning to his office, he received a telephone call from Wayne Coulson advising, in substance, the following: That Wayne Coulson had just learned that the City had registered its bond with the State Auditor; that the City had sold the bond; that it did so because otherwise its books would be out of balance; that the County had done likewise.

Affiant states that he has no knowledge concerning the conditions or terms of the sale of the registered notes to The Fourth National Bank in Wichita but does know that most of the officers of The Fourth National Bank have knowledge of the decision of the Kansas Supreme Court.

Subscribed and sworn to before me this 28th day of March, 1949.

Hazel M Jones
Notary Public

My commission expires: 9-17-52